IN THE

Supreme Court of the United States

October Term, 1945

No. 693

BARNEY E. GASKILL, Et Al,
Petitioners,

vs.

CLAUDE A. ROTH, Trustee of the Property of the Chicago & North Western Railway Company, Et Al,
Respondents.

PETITION FOR REHEARING ON ORDER DENYING CERTIORARI

S. L. Winters,
George P. Burger,
Attorneys for Petitioners.

Law Briefs—OMAHA LINO-SLUG PRINTING CO—416 So. 16th St.

INDEX TO CASES CITED

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners respectfully request this Honorable Court to review its order denying certiorari, and in support thereof submit the following:

I.

To deny certiorari at this time would present a situation where this Court would exercise its judicial discretion to grant a writ of certiorari on the petition of the respondent railroad to determine a preliminary question of adjective law and deny certiorari in the same case when review is sought on the merits of the controversy involving substantive rights of which petitioners claim to have been deprived in violation of the Fourteenth Amendment to the Federal Constitution. The decision of this Court on the jurisdictional question is reported in 315 U. S. 442. Petitioners submit that a matter of much greater general importance is presented here than was presented in the former appeal and the urgency of review is proportionately greater. In this present period of labor strife will not this Court accept the opportunity to clarify the unsettled questions of law regarding the rights and duties of railroads, as employers, and of labor unions, as the bargaining agents of individual employees?

II.

There has been no judicial determination in this case of the questions of law raised by petitioners, namely: Can a railroad labor union, a railroad, or both, without the consent of the individual employees, for other than economic or related reasons, deprive the employees of their seniority rights? Are seniority rights property rights so that they cannot be taken away by the collective bargaining process without the consent of the individual employees? Petitioners contended from the very beginning that seniority rights are property rights and rely on the decision of the Supreme Court of the State of Nebraska, *Rentschler v. Mo. Pac. R. R.*, 126 Neb. 493, 253 N. W. 693, 95 A. L. R. 1, which holds "that these

seniority rights were property rights, and once acquired could not be taken away from them by any agreement between the railroad and bargaining agent." This decision is binding on the federal courts by the decision of *Moore v. Illinois Central R. R.*, 312 U. S. 630, 61 S. C. R. 754, 84 L. Ed. 1099. These decisions have been ignored by the courts below and are not mentioned in either opinion. Both lower courts rely on *Division 525, Order of Railway Conductors v. Gorman*, 133 Fed. (2d) 273, which arose in the State of Arkansas, where there had been no prior local decision. *If petitioners are wrong in this contention, why cannot they obtain a specific judicial finding to that effect?* This Court in the recent decision, *Elgin, Joliet & Eastern Railway Company v. Burley*, —— U. S. ——, 90 L. Ed. ——, —— S. Ct. ——, decided March 25, 1946, adhered to the opinion filed after the first argument, reported in 325 U. S. 711, 89 L. Ed. 1886, 65 S. Ct. 1282, and held that a determination by the Adjustment Board of a dispute brought before it by a union as collective bargaining agent is not binding on the individual employees unless they gave their consent, express or implied. In view of this decision could petitioners be bound by a collective bargaining agreement when the dispute has not been decided by the Adjustment Board and the bargaining agent did not purport to act in behalf of the Nebraska Division men as such and petitioners did not authorize any such representation. If, as respondents claim, the agreement of 1930 deprived petitioners of the right to do the North Western work on the disputed trackage, could the authority be implied when the unions, on their own initiative, requested the railroad to make the changes complained of? The collective bargaining agent, as such, has no authority to act as respondents claim.

III.

Petitioners feel that an explanation of a history of the litigation and of the manner in which the trial was conducted, if emphasized, would present to this Court the urgent necessity to exercise its supervisory powers and review the decisions below. The original petition was filed May 8, 1939, in the U. S. District Court for the State of Nebraska. The respondent, Chicago and North Western Railroad Company, took the position that the petition did not allege the necessary jurisdictional amount and District Judge Donahoe, sustaining respondent's contention, dismissed the action. On appeal to the Circuit Court of Appeals, the decision of dismissal was reversed, 119 F. (2d) 105. On the petition of the North Western Railroad the Supreme Court granted a writ of certiorari and after hearing remanded the case to the District Court without prejudice to an application for leave to amend the bill of complaint, 315 U. S. 442. Amended pleadings were filed and *the case was submitted entirely on stipulated facts and documents.* At the time the facts were submitted and argument made in the District Court, petitioners entertained little doubt that District Judge Donahoe would hold as a matter of fact that prior to the so-called collective agreement of August 19, 1930, petitioners held seniority over the entire disputed trackage from Omaha to California Junction. The argument at the trial centered around the proposition whether or not the so-called collective agreement was in fact a collective bargaining agreement between employer and bargaining agent and, if it was, whether it settled or attempted to settle the question as to what seniority district or division of the North Western was to do the work on the disputed trackage; and finally, if such an attempt was made, whether the railroads or bargaining agents or both had

the right to settle such a question without the consent of the aggrieved employees. This final proposition has not as yet been passed on.

Bear in mind that a complete trial has not been had. Petitioners submit that an accounting based on the books of the railroad would, in addition to showing the actual damage suffered, substantiate their claim that they held seniority on the disputed trackage which was for years recognized by the railroad.

The courts below have considered as evidence the book of rules for the government of the Operating Department of the North Western, received over the objection of counsel for petitioners (original Record, p. 100), and in so doing have failed to recognize the distinction between a seniority district or division and an operating division of the railroad. The trackage between Omaha and Blair owned by the M. & O. Railroad and leased by the North Western may be part of an M. & O. operating division so that the M. & O. would regulate traffic, but regarding the work done by the North Western, it is part of the Nebraska seniority division of the North Western on which petitioners hold seniority.

The lower courts have received certain affidavits originally presented by respondents on the preliminary question of jurisdiction and have considered several statements contained in them as evidence, although they were introduced, over the objection of counsel for petitioners, for the sole purpose of explaining certain documents (original Record, pp. 160, 161). Judge Woodrough, in his statements concerning the 5.9 miles between California Junction and Missouri Valley (p. 18, C. C. A. Record), relies on the affidavit of O. G. Jones, an official of the

respondent Brotherhood of Railroad Trainmen and a former member of the Sioux City Division (3rd paragraph, p. 169, original Record). The statement of Mr. Jones is contradicted in his own affidavit (last paragraph, p. 162, original Record) and is contrary to stipulation (p. 141, original Record).

Both the District Court and the Circuit Court have the mistaken impression that in order to enforce seniority rights, the employees must be accorded such rights every time a new run is inaugurated or a new service is begun. They assert that petitioners were not "cut in" on the business when the Omaha-Sioux City run was routed via Blair and hence cannot complain. They gathered this impression from respondents' briefs and oral argument, for the entire record is authority for the proposition that seniority rights are acquired on trackage and the employees of the seniority division holding seniority rights over described trackage have the right to man the trains operating over that trackage—no matter where the trains are going to or coming from and no matter when a particular run was commenced.

IV.

If the opinion of the Circuit Court is allowed to remain unassailed, it will stand as authority to the effect that seniority rights of railroad employees, for which railroad employees have struggled for years, are insignificant, illusory rights, which may be abrogated or modified by labor unions or railroads, even though the employee does not belong to a union or has not consented. It will stand for the proposition that seniority rights cannot be acquired on leased trackage. The Circuit Court certainly did not intend to hold this, but there is no other conclusion to be drawn.

With no intention to question the integrity and good faith of the trial Judge or appellate Judges, petitioners respectfully submit that the decisions below, if undisturbed, would result in an abuse of the pre-trial process and trial on stipulated facts and evidence provided in the Federal Rules of Procedure. A careful and studious examination of the voluminous record will disclose that many crucial findings of fact are contrary to express stipulation. All petitioners request is an opportunity to present at length the justice of their claim to overcome the absolutely unforeseeable departure from the evidence and to convince this Court that a complete trial should be had, and, if necessary, oral testimony be taken before petitioners are forever barred.

Respectfully submitted,

S. L. WINTERS,
GEORGE P. BURGER,
Attorneys for Petitioners.

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CERTIFICATE OF COUNSEL

S. L. Winters, one of the attorneys in the above entitled proceeding, hereby certifies that this petition is filed in good faith and not for delay and he believes it to be meritorious.

S. L. WINTERS,
Attorney for Petitioners.